Supreme Court, U.S.
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No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

ORVILLE CAMP,

Petitioner,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; INDIAN HILL LIMITED PARTNERSHIP, an Oregon Limited Partnership; THE NATURE CONSERVANCY, a Washington D.C. non-profit corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Ninth Circuit err in affirming Summary Judgment to a federal Defendant on purely statute of limitation grounds where the United States Bureau of Land Management ("BLM") was required by both the Due Process Clause of the Fifth Amendment and federal regulations to provide actual notice of a 1987 conveyance of federal land to a private party when BLM admittedly gave no actual notice to Plaintiff and affirmatively misrepresented that no conveyance of federal land occurred?

II. Did the Ninth Circuit err in departing from existing Supreme Court policy for establishing equitable tolling and equitable estoppel as proclaimed under *American Pipe &Construction Co. v. Utah*, and clarified in *Irwin v. Department of Veteran Affairs*, by requiring a scienter or mens rea of intentional fraud by the government, thereby effectively eliminating the defenses of equitable tolling and/or equitable estoppel which redress negligent affirmative governmental misrepresentations?

III. Did the Ninth Circuit err in granting Defendant's motion for Summary Judgment where there is undisputed official government communications upon which a reasonable person would rely, in lieu of a single disputed informal conversation with a nongovernmental third party, who asserted ambiguous facts contradicted by the federal government's official representations?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Orville Camp respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Camp v. United States Bureau of Land Management*, 183 F.3d 1141 (9th Cir. 1999) (App. A). The unpublished memorandum of the United States Court of Appeals for the Ninth Circuit accompanying this opinion can be found in Appendix B. The opinion of the District Court is reported at *Camp v. United States Bureau of Land Management*, 17 F.Supp.2d 1167 (D.Or. 1998).

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered its opinion and memorandum for this case on July 23, 1999. The opinion is reported at *Camp v. United States Bureau of Land Management*, 183 F.3d 1141 (9th Cir. 1999) (App. A). The memorandum is unpublished, but is reprinted in Appendix B. The District Court opinion is reported at *Camp*

v. United States Bureau of Land Management, 17 F.Supp.2d 1167 (D.Or. 1998). Petitioners timely filed a Petition for Rehearing and a Petition for Rehearing en banc. The Court of Appeals denied these petitions on October 7, 1999 (App. C). This Petition was timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ."

43 C.F.R. § 2201.1(e) (1987) provides in relevant part: "notice of realty action . . . shall be sent to other known interested parties of record including, but not limited to, adjoining landowners and current land users."

40 C.F.R. § 1503.1(a)(4) (1987) provides in relevant part: "the agency shall . . . [r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected."

28 U.S.C. § 2401(a) (1987) provides in relevant part: "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

STATEMENT OF THE CASE

The fundamental question in this case is whether the United States Bureau of Land Management ("BLM") may be granted summary judgment, on statute of limitations grounds, after affirmatively misrepresenting to Plaintiff that his water right property interest was under federal ownership when in fact the BLM had conveyed this federal property, thereby inducing Plaintiff into the reasonable belief that no action was necessary to preserve his ongoing rental of a federal water access easement on public lands.

The BLM undertook a conveyance of federal public lands with the Nature Conservancy in 1987. This parcel of land contained Tuttle Springs, named after Plaintiff's grandmother,[1] and to which Plaintiff and his predecessors in interest maintained a water easement right of way property interest. The facts are undisputed that the BLM did not provide Plaintiff with any actual notice of the land exchange at issue in this action as required by law. *See e.g.* 43 C.F.R. § 2201.1(e) (1987); *see also* 40 C.F.R. § 1503.1(a)(4) (1987). Also undisputed is the fact that the BLM continued to represent to Plaintiff that he was paying rent for his

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1 This water access easement has been used by the Camp family for three generations and has been used by Camp's predecessor in interest since 1858, one year before Oregon was admitted as a state to the United States.

easement across "public lands" property interest until 1997. These lands had in fact undergone two transfers of ownership and now were owned by defendant Indian Hill Limited Partnership. Plaintiff Camp learned of the transfer when defendant Indian Hill Limited Partnership sued him for trespassing as he attempted to repair his water source after a logging operation by Indian Hill.

Plaintiff Camp filed his original Complaint in the present action on December 24, 1996, and ultimately entered his Second and final Amended Complaint on November 25, 1997.

Plaintiff Camp filed a Motion for Partial Summary Judgment on December 9, 1997. Defendant BLM filed a Motion for Summary Judgment on December 9, 1997. The trial court held a telephone hearing on all dispositive cross motions on February 10, 1998, before the honorable Judge Michael R. Hogan.

The District Court entered an Order granting Defendants BLM and The Nature Conservancy's Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment on April 14, 1998. A final judgment was entered by the District Court on April 24, 1998. Plaintiff Camp timely filed a Notice of Appeal on May 1, 1998.

The Ninth Circuit Court of Appeals affirmed the District Court on different grounds on July 20, 1999.

Plaintiff Camp timely filed a Petition for Rehearing and Petition for Rehearing en banc which were denied on October 7, 1999.

Plaintiff Camp has filed a Petition for Writ of Certiorari based upon the issues and arguments presented herein.

ARGUMENT FOR GRANTING WRIT

Introduction

The Ninth Circuit's grant of summary judgment to the Bureau of Land Management ("BLM"), under the facts described above, turns the Supreme Court's "rebuttable presumption of equitable tolling"[2] into a rebuttable presumption **against** equitable tolling and improperly adds a mens rea requirement on the part of the defendant. This test allows the BLM to benefit from its affirmative misrepresentations by dismissal of the action on statute of limitations grounds and denies Plaintiff an opportunity to judicially redress the loss of his water access easement property interest. This results in a clear misapplication of the well settled jurisprudence regarding the standards for granting or denying a Motion For Summary Judgment and is

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2 *Irwin v. Department of Veteran Affairs*, 489 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

a significant departure by the Ninth Circuit from existing Supreme Court jurisprudence pertaining to equitable tolling and equitable estoppel.

Despite the fact that the Ninth Circuit panel's published opinion of July 20, 1999 in this action correctly found that the Bureau of Land Management's ("BLM") publication of notice of a federal land exchange in the Federal Register was not sufficient notice to Plaintiff Camp pursuant to 44 U.S.C. §1507, where **actual** notice of the federal land exchange to Camp was expressly required as a matter of law,[3] the Ninth Circuit misapplied the test announced by the Supreme Court in *American Pipe &Construction Co. v. Utah*, 414 U.S. 538, 559, 94 S.Ct. 756, 38 L.Ed. 713 (1974), and clarified in *Irwin*, 489 U.S. at 95-96. The Ninth Circuit panel erred by ignoring a plethora of evidence indicating **affirmative misrepresentations** by the BLM and instead improperly held that Plaintiff's action was not timely filed pursuant to the six year statute of limitations of 28 U.S.C. § 2401(a).

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3 Along with the requisite notice arising under the Due Process Clause of the Fifth Amendment of the United States Constitution, the BLM was expressly required to provide notice under the regulations promulgated under the Federal Land Policy Management Act (43 C.F.R. 2201.1(e) (1987)) (requiring actual notice to adjoining landowners of a land exchange) and the National Environmental Policy Act (40 C.F.R. 1503.1(a)(4) (1987)) (requiring actual notice to interested or affected parties).

This unpublished decision requires Supreme Court review as the Ninth Circuit has created a more difficult, and incorrect, test for equitable tolling. Under existing Supreme Court precedent, the BLM is lawfully precluded from benefitting from its affirmative misconduct and express misrepresentations as to the ownership status of this public land, by falsely suggesting to the Camps that there was no conveyance of this federal property.[4] In this regard, the Ninth Circuit's memorandum decision is not consistent with the well developed jurisprudence of the Supreme Court concerning the doctrines of equitable tolling and equitable estoppel which states quite clearly that "this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *American Pipe & Construction Co. v. Utah*, 414 U.S. at 538; *see also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-235, 79 S.Ct. 760, 3 L.Ed.2d 770 (1958); *Holmberg v. Albrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946). The Ninth Circuit instead improperly relied upon a line of Ninth Circuit decisions, never ratified by the Supreme Court, which incorrectly now hold that the government may

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4 *See* Excerpt of the Record (hereinafter "ER") at 37-40 (BLM 1992 billing statement sent to Lowell Camp for rental of alleged "public lands" five years after land exchange, when land was not actually owned by BLM); *see also* ER at 94-95 (deposition of Craddock admitting that BLM gave false information to Camps in 1992 regarding status of land ownership, and never issued any subsequent corrections).

benefit from negligent affirmative misrepresentations without redress to the doctrines of equitable tolling and equitable estoppel so long as there is no evidence of intentional governmental fraud.[5] *See* Appendix B at App. 16-17 (unpublished memorandum). These holdings thereby negate the policy and rule of law holding that the government cannot benefit from its own affirmative misconduct. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

The Ninth Circuit panel also erred, and departed from well established jurisprudence regarding the standards governing the grant of summary judgment, by awarding summary judgment to the BLM in this action based entirely upon contested allegations in the affidavit of Mr. Firth suggesting that the Camps received actual notice. Not only is this position inconsistent with the *American Pipe* and *Irwin* test, but Mr. Firth's allegation was improperly adopted as an undisputed fact by the Ninth Circuit panel, without the benefit of any evidentiary hearings or of any trial court

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5 The Ninth Circuit also stated that even if fraudulent conduct was not required, BLM's conduct must have risen to a higher level of culpability than mere negligence. *See* Appendix B at 16-17. This test is directly contradictory to Supreme Court jurisprudence which focuses on the **effects** of the defendant's misrepresentations, not their scienter. *See Glus v. Brooklyn Eastern Terminal*, *supra*, 359 U.S. at 232 ("to decide this case we need look no further than the maxim that no man may take advantage of his own wrong." The Court noted that this principle is "[d]eeply rooted in our jurisprudence." *Id.*)

findings as to the truth of the affiant's assertions, or as to the credibility of the affiant's assertions of fact. Moreover, the Ninth Circuit did not discuss whether this alleged informal conversation should be deemed actual notice or was in fact nullified by multiple official BLM correspondences incorrectly stating that Plaintiff was continuing to use and rent federal property through 1997.

In this regard, the unpublished memorandum by the Ninth Circuit conflicts with pre-existing decisions of the United States Supreme Court and the Ninth Circuit, and therefore consideration of this matter by the Supreme Court is necessary in order to secure and maintain uniformity of the court's decisions in accordance with Supreme Court precedence. *See e.g. Hunt v. Cromartie*, 119 S.Ct. 1545 (1999) (summary judgment is inappropriate when evidence is susceptible to different interpretations).

Equitable Tolling and Estoppel

Supreme Court jurisprudence clearly provides that where an agency makes affirmative misrepresentations to a party which causes confusion or delay in discovering claims or filing an action, the doctrines of equitable tolling and equitable estoppel should be applied to prevent the federal agency from benefitting from the consequences of its misinformation or affirmative misconduct. *See e.g. Irwin v. Department of Veterans Affairs*, 498 U.S. at 95-96; *Glus v.*

Brooklyn Eastern District Terminal, 359 U.S. at 232-235. This precedent is followed in some of the Ninth Circuit's cases incorporating equitable tolling,[6] but the Ninth Circuit in this action improperly adopted a test based upon a line of cases which are inapplicable in this action and thus in conflict with Supreme Court precedent.

In *Irwin*, the Supreme Court discussed equitable tolling and explained that equitable tolling clearly applies in suits against the federal government, and that this defense to a statute of limitations issue creates a "rebuttable presumption of equitable tolling." *Irwin v. Department of Veterans Affairs, supra*, 498 U.S. at 95-96. Summarizing the Supreme Court holdings on this issue, this Court stated:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's

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6 *Cf. Gates v. Georgia-Pacific Corporation*, 492 F.2d 292, 295 (9th Cir. 1974) (tolling of statute of limitations requires "confusion" by Plaintiff); *FEC v. Williams*, 104 F.3d 237, 240-241 (9th Cir. 1996) (tolling of statute of limitations requires "fraudulent conduct" and concealment by defendant); *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989) (tolling of statute of limitations requires conduct "beyond mere negligence" by defendant); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (tolling of statute of limitations requires "wrongful conduct" by defendant).

misconduct into allowing the filing deadline to pass.

Id. at 96. The Supreme Court has consistently stated that equitable tolling is based upon the defendant inducing or otherwise causing the Plaintiff to be unaware of the existence of a cause of action. *Id.*

The Ninth Circuit, however, has in recent years departed from the Supreme Court test, and although they have occasionally held that equitable doctrines apply to cases involving governmental error,[7] they have adopted a much more difficult standard which requires a mens rea of fraud on the part of the government, and apparently disallows equitable tolling when based on affirmative misconduct resulting from negligence. This conflicts with Supreme Court precedent and the basic premise of equitable tolling, summarized in *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999): "Equitable tolling applies when the Plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant . . ." (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir. 1996)).

In the case at hand, the BLM's misrepresentations to

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7 *See e.g Gates v. Georgia-Pacific Corporation*, 492 F.2d 292, 295 (9th Cir. 1974) (If governmental misinformation causes confusion as to a party's knowledge of their legal rights, equitable tolling will apply.)

Plaintiff as to their alleged continuing ownership of the land from which Plaintiff's family drew their water induced Plaintiff into the belief that there was no need for any action to maintain the status quo. In such a situation, under *American Pipe* and *Irwin*, the statute of limitations must be tolled.[8]

Clearly, these decisions demonstrate that under existing Supreme Court precedent, as a matter of law, a

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8 The Ninth Circuit, in the context of the related doctrine of equitable estoppel, has similarly recognized the effect of governmental misinformation. *See e.g. Brandt v. Hickel*, 427 F.2d 53, 86 (9th Cir. 1970) ("some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement."). As the Ninth Circuit explained in *Brandt*: "[t]o say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Id.* at 57.

See also U.S. v. Lazy FC Ranch, in which the Ninth Circuit again explained that "estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." 481 F.2d 985, 989 (9th Cir. 1973) (citation omitted). Furthermore, the Ninth Circuit stated that "[i]n the case at bar, it would be a great injustice if the government were not held responsible for the advice it gave the Ranch." Id.

See also United States v. Wharton, 514 F.2d 406, 410 (9th Cir. 1975). In *Wharton*, much like the case at hand, BLM officials provided false information as to the land ownership status to a party claiming an interest in alleged federal property. *Id.* This Court explained that the policy behind the application of equitable estoppel under such circumstances is that "the public has an interest in seeing its government deal carefully, honestly and fairly with its citizens." *Id.* at 413.

federal agency may not provide a party with misinformation as to the status of their property interests, and/or engage in affirmative misconduct by failing to provide notice required by law, and then attempt to derive benefit from that party's confusion or delay in seeking legal redress resulting from the federal government's misinformation, misrepresentations or affirmative misconduct. The Ninth Circuit's application of a test requiring either governmental "fraudulent concealment" or requiring activity greater than "negligence" skews the *Irwin* test, and makes a "rebuttable presumption" in favor of equitable tolling into a "rebuttable presumption" against equitable tolling, and improperly adds the additional requirement of governmental **intent** to misinform, thereby allowing the government to benefit, on statute of limitations grounds, from negligent affirmative misconduct and misrepresentations.

The Facts Of This Case Demonstrate Both Affirmative Misrepresentations And Affirmative Misconduct By BLM Which Merit Application Of Equitable Tolling And Estoppel

The facts which demonstrate both BLM's affirmative misrepresentations and affirmative misconduct, to the prejudice of Lowell Camp (Plaintiff's uncle and predecessor in interest), are not in dispute in the present action.

First, it is not disputed that the BLM failed to provide any

actual notice to the Camp family at the time of the land exchange decision, despite the fact that actual notice to the Camp family was expressly required by two separate regulations[9] and by application of the Due Process Clause of the United States Constitution. *See* Affidavit of Camp, ER 25-26, CR 73; *see also* Second Affidavit of Camp, ER 111-112, CR 84; *see also* Deposition of BLM realty specialist James Badger, ER 54, CR 73. ("I'm not aware of any notice that went to them [the Camp family].)"; *see also* Deposition of BLM realty specialist Matthew Craddock, ER 96-98, CR 73.

As a result of BLM's failure to provide notice of the land exchange as required by law, the Camp family was denied any opportunity to participate in the administrative process to challenge this decision, or to otherwise avail themselves of opportunities to participate in administrative appeals to challenge the BLM's land exchange decision through procedures provided by law. ER 29. BLM's failure to provide the Camps with public participation in the administrative process is itself a serious violation of the federal Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et. seq.*, which provides a cause of action to set aside unlawful actions by agencies of the United

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9 *See* 43 C.F.R. § 2201.1(e) (1987); *see also* 40 C.F.R. § 1503.1(a)(4) (1987).

States.[10]

Moreover, BLM's failure to provide actual notice to the Camp family is also a clear violation of the Due Process Clause of the United States Constitution, as Plaintiff Camp's right-of-way easement to use, maintain and repair his domestic and agricultural water right at Tuttle Spring is a recognizable property interest that must be afforded the protection of due process of law pursuant to the Fifth Amendment of the United States Constitution. Defendant BLM's failure to provide actual notice to Plaintiff, or his predecessor-in-interest, of this land exchange decision is contrary to the procedural due process requirements of the Fifth Amendment of the United States Constitution.[11] Therefore, actual notice to Plaintiff of the BLM's land exchange was independently required by application of the

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10 *See* 5 U.S.C. § 706; *see e.g. Com. of Mass. v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983); *Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir. 1978); *I-291 Why? Association v. Burns*, 517 F.2d 1077, 1081 (2d Cir. 1975).

11 It cannot be disputed that a right-of-way easement is a protected property interest subject to all of the safeguards provided by the United States Constitution. *See e.g. Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982) (federal constitution requires government compensation for taking of easement), *see also United States v. Certain Parcels of Land in Fairfax County*, 345 U.S. 344, 349, 73 S.Ct. 693, 695-696, 97 L.Ed. 1061 (1953) (easements are legally recognized property interests).

Fifth Amendment Due Process clause of the U.S. Constitution.[12]

As a matter of law, BLM's violation of both the Fifth Amendment of the U.S. Constitution, the federal APA, and two express federal regulations simply cannot be deemed "mere negligence" as suggested by the Ninth Circuit's unpublished opinion. *See* Appendix B at App. 16-17 (unpublished memorandum). Plaintiff is unaware of any previous ruling by any federal court which has held that such clear violations of federal regulations and the United States Constitution constitute "mere negligence." In fact, the Ninth Circuit had previously expressly held that similar violations of a party's constitutional due process rights constitute serious agency misconduct and thus merit application of the equitable doctrine as a matter of law. *See Brandt v. Hickel, supra,* 427 F.2d at 56-57.

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12 *See e.g. Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565 (1988) (owner of an unsecured claim has right to receive actual notice under due process clause of the constitution); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (due process requires constructive notice to be supplemented by actual personal service by mail to mortgagee with known address); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950) (due process requires notice calculated to apprise interested parties of federal action sufficient to present their objections); *Harris v. County of Riverside*, 904 F.2d 497, 502-503 (9th Cir. 1990) (notice by publication is insufficient to satisfy due process and requiring actual notice by mail for rezoning which affected Plaintiff's property).

Moreover, in the case at hand, BLM's failure to provide prior notice to the Camps of this federal land exchange is merely the "tip of the iceberg" as to the scope of BLM's official misconduct in the present action. The BLM repeatedly provided the Camp's with inaccurate misinformation, to the extent of affirmatively misrepresenting to Lowell Camp that the subject property was still public land owned by the BLM in 1992, and thereby suggesting that the property had not been transferred through the challenged land exchange. *See* ER at 37-40, ER 55, ER 94-95.

For example, in June of 1992—five years after the BLM had already conveyed the subject property through the challenged land exchange—the BLM affirmatively and expressly misinformed Lowell Camp that he was continuing to rent "public lands" for his easement "through calendar year 1996." *See* ER at 37. The record is clear that BLM sent Lowell Camp this decision document by certified mail. *See* ER 38. This document falsely informed Camp that the BLM's Grants Pass Area Manager had made a new [1992] decision regarding the "use and occupancy of the public lands" of the subject property (which BLM had actually already conveyed out of public ownership five years earlier). *See* ER 37. This document also expressly misinformed Lowell Camp that he could expect to continue to rent these public lands though 1997 upon his payment of rental fees to

BLM. *See* ER 37-39.

The undisputed evidence also demonstrates that BLM's realty specialist at that time, Mr. Matthew Craddock, telephoned, and then personally visited with Lowell Camp later that year, specifically to facilitate collection of this improper rent, and that Mr. Craddock specifically misinformed Lowell Camp that he was continuing to rent "public lands" (when in fact the subject property had already been conveyed to The Nature Conservancy in 1987). *See* ER 76. It is also undisputed that BLM then accepted Mr. Camp's money for the alleged rental of these public lands from 1992 through July 7, 1997, *see* ER 40 (BLM Receipt and Accounting), and never issued any corrections whatsoever regarding this misinformation, or ever attempted to return or refund Mr. Camp's rental payment, in order to clarify that he was not actually renting public lands at that time. *See* ER 94-95. In fact, both of BLM's realty specialists concede that there were misrepresentations made to Lowell Camp by the BLM, and that no attempt was ever made to issue any correction to Camp, or to otherwise clarify that he was not in fact continuing to rent public lands for his easement though July 7, 1997. *See* ER 55, ER 80, ER 94-95.

BLM concedes that its attempt to collect rent for the alleged use and occupancy of federal lands in 1992 was improper. ER 107 ("Defendant BLM admits that it

improperly collected rental payments in contravention of the current landowner's rights from December 22, 1987 to December 31, 1996.").

Clearly, the undisputed facts demonstrate that BLM made serious affirmative misrepresentations to Lowell Camp indicating that he was continuing to rent public lands from the BLM through 1997. As the Supreme Court test, under *Irwin, American Pipe,* and *Glus* is whether or not defendant induced Plaintiff into delaying a cause of action, and as defendant BLM misrepresented to Plaintiff Camp that his water access easement property interest was still on "public lands," equitable tolling applies and bars the running of the statute of limitations because Plaintiff Camp was unaware of the necessity of commencing a cause of action as a result of federal Defendants' affirmative misconduct.

The Firth Affidavit Does Not Establish Actual Notice, Or Negate Plaintiff's Entitlement To Equitable Tolling

The BLM's affidavit of John Firth does not defeat Plaintiff's entitlement to equitable tolling as a matter of law, or otherwise establish that Lowell Camp had actual notice of the challenged land exchange in 1989. In fact, a close review of the totality of the evidence in this matter supports exactly the opposite conclusion - that Lowell Camp was unaware of the federal land exchange at least three years after the

incident described in Mr. Firth's affidavit. Therefore, the Ninth Circuit's reliance on the Firth Affidavit as establishing "actual notice" to Lowell Camp as a matter of law, *see* Appendix B at 13-16 (unpublished memorandum), ignores the myriad of contrary evidence which suggests that Lowell Camp was not aware that the BLM had conveyed the subject property in the challenged land exchange. Clearly, the overall context of information directed to Lowell Camp in official correspondences from the BLM indicated that this property was still owned by the United States and had not been conveyed to private ownership. *See e.g.* ER at 37, 75-76. Therefore, the Ninth Circuit erred in ruling that inferences which would reasonably have been derived from official government correspondence should be ignored in favor of a less reasonable inference that Lowell Camp would have believed facts allegedly presented by Mr. Firth, a non-governmental employee, in an informal conversation. In the context of Summary Judgment, all disputed facts and inferences are to be drawn against the moving party, and it is inappropriate to enter Summary Judgment when there are reasonable contrary inferences which can be drawn. *Hunt v. Cromartie*, *supra*, 119 S.Ct. at 1552.

There is certainly evidence that suggests Lowell Camp was unaware of the land exchange in June of 1992, when the BLM expressly requested that he pay rental fees for the "use and occupancy of public lands." *See* ER 37-40.

How else can one explain Lowell Camp's willingness to write BLM a check for the use and occupancy of public lands? *See* ER 40 (receipt). Certainly, a more reasonable inference could be made that Lowell Camp believed the 1992 representations by BLM, which were made in an official BLM decision document, *see* ER 37-39, and which were supported by express assertions made by a BLM realty specialist, ER 75-76, evidence strongly suggesting that there had been no conveyance of the subject property. In considering the strength of Mr. Firth's assertions, it is important to recognize that a person may hear all sorts of assertions in the context of an informal conversation. The Ninth Circuit's exclusive reliance on the Firth affidavit suggests that Lowell Camp, or any other reasonable person, should always believe everything that is asserted in the context of an informal conversation, even where the "facts" asserted are not supported by any other records, and even where the "facts" are contradicted by official government records and assertions made by representatives of the United States government.

Furthermore, a review of the assertions made by Mr. Firth show that his statements are at best ambiguous, and quite capable of more then one interpretation. As explained in the Second Affidavit of Orville Camp, the mere fact that Indian Hill representatives asserted that they "acquired" a right to log this property, as suggested in the Firth affidavit,

is not conclusive evidence of actual notice of the conveyance of the subject property from public to private ownership. *See* Affidavit of Firth at 2 (Federal Appellee's Supp. ER at Tab 3). Indian Hill had previously "acquired" the right to log this property when it was owned by the BLM, as part of a federal timber sale on the very same location. *See* ER 112. Therefore, the Affidavit of Firth's single sentence assertion that he informed Lowell Camp that Indian Hill had "acquired" the subject property for its 1989 logging operation could easily have suggested to Lowell Camp that Indian Hill was merely once again logging federal timber on this property as part of a federal timber sale.

Finally, as discussed above, Plaintiff denies that Mr. Firth ever made the statements which are asserted in his affidavit. *See* ER at 112. Mr. Firth's credibility as a reliable witness has been cast into doubt by inconsistent statements he has made in the past, and inconsistencies in his present affidavit. The affidavit of Mr. Firth is internally inconsistent with the documents which he has attached to support his assertions, suggesting that Mr. Firth's assertions are inaccurate, or that Mr. Firth has fabricated the assertions of his conversation with Lowell Camp in 1989. For example, Mr. Firth's affidavit claims that he showed Lowell Camp the "Oregon Department of Forestry approved written logging plan." *See* Affidavit of Firth at 2 (Federal Appellee's Supp. ER at Tab 3). However, Mr. Firth has attached the approved

written plan from the Oregon Department of Forestry, which already described Firth's alleged interaction with Lowell Camp. It is quite impossible for Mr. Firth to have actually shown this final approved written plan to Lowell Camp and, at the same time, for this document to already include a description of this meeting **before** it happened. Certainly the credibility of Mr. Firth's assertions in this regard cannot be accepted as undisputed fact. *See e.g. Hunt v. Cromartie*, 119 S.Ct. at 1552 (summary judgment inappropriate when evidence is susceptible to different interpretations). In any event, Plaintiff's have never had an opportunity to test Mr. Firth's credibility in any evidentiary hearings, nor are there any findings by the trial court regarding these factual allegations. Existing Ninth Circuit jurisprudence holds that summary judgment must be denied under these circumstances, in the absence of an evidentiary hearing to evaluate the credibility of the affiant. *See e.g. Aronsen v. Crown Zellerbach*, 662 F.2d 584, 595 (9th Cir. 1981); *see also Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981).

Where there are issues of credibility as to the assertions in a party's litigation affidavits, summary judgment must be denied as a matter of law. *See e.g. Hunt v. Cromartie*, 119 S.Ct. at 1552; *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988); *Hoover v. Switlik Parachute Company*, 663 F.2d 964, 967-968 (9th Cir.

1981).

More specifically, issues pertaining to the credibility of the affiant's assertions require an evidentiary hearing, and therefore may not properly be decided by summary judgment, or for the first time on appeal. *See e.g. Aronsen v. Crown Zellerbach, supra*, 662 F.2d at 595; *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980). The Ninth Circuit's unpublished memorandum in the case at hand is inconsistent with this rule of law by ignoring all issues of credibility in the Firth affidavit, and summarily granting summary judgment to the BLM in the present action.

Conclusion

The Ninth Circuit's grant of summary judgment to the BLM, under the facts described above, turn the Supreme Court's "rebuttable presumption of equitable tolling"[13] into a rebuttable presumption **against** equitable tolling and improperly adds an "intentional fraud" mens rea requirement on the part of the defendant. This results in a clear misapplication of the well settled jurisprudence regarding equitable tolling and the standards for granting or denying a Motion For Summary Judgment. This Court should find the

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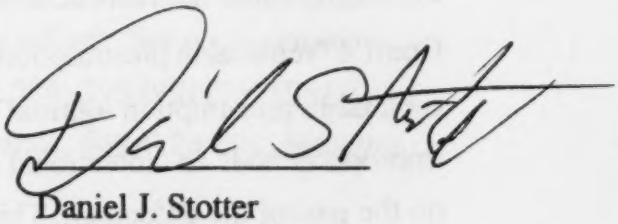
13 *See e.g. Irwin v. Department of Veterans Affairs*, 498 U.S. at 95-96 (rebuttable presumption of equitable tolling).

Statute of Limitations tolled because of defendant BLM's affirmative misrepresentations which induced Plaintiff into the reasonable belief that his water access easement property interest was still across "public lands" administered by the BLM and that no action was necessary to maintain the status quo of a water easement that he was allegedly renting through 1997. Alternatively, this Court should remand the question of equitable tolling based upon the question of the credibility of the Firth affidavit and whether this informal conversation, in the context of a Motion for Summary Judgment, should override all contrary inferences which could reasonably be derived from official governmental correspondence.

Respectfully submitted this 29th day of December, 1999.



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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORVILLE J. CAMP, JR., Plaintiff-Appellant, v. UNITED STATES BUREAU OF LAND MANAGEMENT; INDIAN HILL LIMITED PARTNERSHIP; THE NATURE CONSERVANCY, Defendants-Appellees	No. 98-35465 D.C. No. CV-96-3099-HO OPINION

Appeal from United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding
Argued and Submitted
May 3, 1999-Portland, Oregon
Filed July 20, 1999
Before: William C. Canby, Jr. and Thomas G.Nelson,

Circuit Judges, and Jeremy Fogel,[1] District Judge.

Opinion by Judge Fogel

COUNSEL

Daniel J. Stotter, Bahr & Stotter Law Offices, Eugene, Oregon, for the Plaintiff-appellant.

Ellen D. Katz, United States Department of Justice, Washington, D.C., for the defendant-appellee United States Bureau of Land Management.

Christopher L. Cauble, Walter L. Cauble, Shultz, Salisbury, Cauble & Dole, Grants Pass, Oregon, for defendant-appellee Indian Hill Limited Partnership.

Gregory J. Miner, Bogle & Gates, Portland, Oregon, for defendant-appellee The Nature Conservancy

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OPINION

FOGEL, District Judge:

The District Court found that appellant's challenges to a transfer of land made by the United States Bureau of Land Management (BLM) were time-barred because the statute of limitations began to run when BLM published

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1 The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

notice of the proposed land transfer in the Federal Register.[2] We conclude that publication of notice in the Federal Register was insufficient to trigger the statute of limitations because BLM had a duty to give appellant's predecessor in interest personal notice of the proposed transfer. In an unpublished memorandum filed herewith, however, we conclude that appellant's claims nevertheless are time-barred because his predecessor in interest had actual notice of the transfer outside the limitations period.[3] We therefore will affirm the judgment.

I.

Appellant Orville J. Camp, Jr. owns rural real property with no water source of its own. Since 1858, Camp's predecessors in interest have drawn water from Tuttle Springs, located on adjacent property. Tuttle Springs is named for Camp's grandmother. Camp's water right in Tuttle Springs is memorialized by an Oregon Certificate of Water Right. Camp claims an implied easement to access the water right; the scope and existence of any implied easement presently are the subject of litigation in an Oregon state court proceeding between Camp and the current owner of the

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2 *Camp vs. United States Bureau of Land Management*, 17 F.Supp.2d 1167 (D.Or. 1998).

3 The unpublished memorandum also disposes of appellant's other contentions on appeal.

adjacent property.

As of 1977, the adjacent land was owned by the United States. At that time, BLM granted a twenty year right of way to Camp's immediate predecessor in interest, his uncle, Lowell Camp. Under the terms of the right of way Lowell Camp was permitted to maintain a water pipeline to the spring.

In December 1987, BLM conveyed the adjacent property to defendant The Nature Conservancy ("TNC") by issuing a land patent. TNC in turn conveyed the property to defendant Indian Hill Limited Partnership ("Indian Hill"), the present owner.[4] The ownership transfers were part of a land exchange whereby BLM received environmentally-sensitive land in exchange for the land conveyed. Defendant TNC acted as a go-between to facilitate the exchange.

BLM first gave public notice of the proposed conveyance on July 7, 1987, by publication in the Federal Register. *See* 52 Fed. Reg. 25,476. BLM also published notices regarding the conveyance in two local newspapers. BLM admits, however, that there is no evidence that Lowell

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4 The record is unclear as to the precise timing of the transfer and as to entity names. Camp filed an affidavit, indicating the property actually was transferred to "Indian Hill Timber Company," a "predecessor in interest" to Indian Hill. Camp's declaration gives a date to that transfer which *predates* the land patent. This apparent inconsistency is irrelevant because there is no dispute that the land went from BLM to Indian Hill through TNC.

Camp was notified personally of the proposed conveyance, despite the fact that a then-applicable regulation required such notice to adjoining landholders. *See* 43 C.F.R. § 2201.1 (e), as in effect in 1987. ("The notice of realty action shall be sent to . . . adjoining landowners . . . .").

TNC and Indian Hill each took the property subject to Lowell Camp's right of way. When that right of way expired by its terms in 1997, however, Indian Hill refused to renew it on the same terms. Camp contends that had the adjacent land remained in BLM's hands, the right of way almost certainly would be renewed. *See* 43 C.F.R. 2803.6-5 (a) (the agency "shall renew the grant so long as the project or facility is still being used for the purposes authorized in the original grant and is being operated and maintained in accordance with all the provisions of the grant and pursuant to the regulations of this title.").[5] Camp also contends that if he or his uncle had received noticed of the proposed conveyance they could and would have taken a variety of steps to protect their interests.

Camp brought this action under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* ("APA") and the Quiet Title Act, 28 U.S.C. § 2409a, alleging that BLM failed to give Lowell Camp proper notice of the planned

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5 At oral argument, BLM suggested that the right of way would *not* have been renewed because it had not been used properly. This argument goes beyond the record.

conveyance of the adjacent property, thereby denying him due process. The district court ruled that Camp's APA and due process claims against BLM are barred by the applicable six-year statute of limitations and there was no jurisdiction under the Quiet Title Act because BLM disclaimed any interest in the property. The district court further held that because BLM is an indispensable party, Camp's claims against the other defendants necessarily fail. Finally, the district court declined to exercise supplemental jurisdiction over Camp's remaining state law claim, brought under Oregon's quiet title statute.

II.

The district court's grant of summary judgment is reviewed de novo. *See San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998).

III.

Publication of Notice in the Federal Register Is Insufficient to Start the Statute of Limitations Running as to Persons Entitled by Law to Receive Personal Notice.

44 U.S.C. § 1507 provides, in relevant part,

> A document . . . published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of

> the Federal Register and a copy made available for public inspection . . . . [F]iling of a document . . . *except in cases where notice by publication is insufficient in law*, is sufficient to give notice of the contents of the document to a person subject to or affected by it.

(emphasis added).

Here, Camp raises no claim that the notice in issue was not duly filed or made available for public inspection. Rather, Camp argues that notice by publication was "insufficient in law" because BLM was required by regulation to give personal notice to Lowell Camp.

We have found little authority applying or even considering this statutory exception to the rule that publication in the Federal Register serves as notice to all affected parties. In *Covelo Indian Community v. Federal Energy Regulatory Comm'n*, 895 F.2d 581 (9th Cir. 1990), we rejected an argument that the Federal Energy Regulatory Commission deprived certain Native Americans of due process by failing to give them actual notice of license renewal proceedings regarding a hydroelectric project. *Id.* at 587-588. We alluded to the exception for cases "where notice by publication is insufficient in law," but concluded that the Native Americans' interest in the licensing proceedings was insufficient to give rise to a due process

right to receive actual notice. *Id.* at 582.[6]

In *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), the Eighth Circuit concluded that as a trustee for certain Native American funds it held, the United States could not rely on publication in the Federal Register alone to start the statute of limitations running on the time for beneficiaries to make claims to the funds. *See* 108 F.3d at 902 n.5. Although the court cited section 1507, it did not rely expressly on the exception therein.

In *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), the *dissent* argued that the "insufficient in law" exception should have been applied to relieve certain landowners from being charged with constructive notice of unrecorded easements such that the landowners could not claim to be bona fide purchasers under Alaska's recording act. *See* 667 P.2d at 731. The easements in issue were not set forth in the land patents given to the landowners'

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6 In so holding, we distinguished *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny on grounds that those cases involved "imminent government action directly affecting parties' property rights." *Covelo Indian Community*, 895 F.2d at 587. Here, Camp also relies on *Mullane* and its progeny to argue that BLM was also legally obligated to give Lowell Camp personal notice as a matter of due process. BLM responds that because its conveyance of the property was subject to the existing right of way, the conveyance destroyed no property interest belonging to Lowell Camp and due process analysis is irrelevant. Because BLM was required by regulation to give personal notice, we need not decide whether due process also required such notice.

predecessors in interest by the federal government, but had been described in prior Federal Register notices regarding planned roadways. *See id.* The dissent contended that since Alaska law does not charge landowners with notice of pre-patent transactions or of instruments not recorded in the chain of title, the Federal Register notices were "insufficient in law" to put the landowners on constructive notice. *See id.* The majority opinion did not discuss the issue.

Finally, in *Bennet v. Director, Office of Workers' Comp. Prog., U.S. Dept. of Labor*, 717 F.2d 1167 (7th Cir. 1983) the petitioner raised a claim that he was entitled by regulation to notice of certain administrative appeal rights and deadlines. *See* 717 F.2d at 1169. The petitioner, however, conceded at oral argument the regulation did *not* call for such notice. *See id.* The court then applied the general rule of section 1507 without discussion of the exception. *See id.* Arguably the fact that the court discussed petitioner's abandoned claim implies that it would not have applied the general rule if petitioner had a valid argument that personal notice was required by the regulation.

[1] The lack of clear precedent does not mean, however, that the statute or its application to the facts here is unclear. By the plain language of the statute, publication in the Federal Register does not serve as notice where notice by publication is "insufficient in law." Here, there is no dispute that BLM had a legal duty to ensure that notice of the

proposed transaction was "sent" to Lowell Camp, an "adjoining landowner." *See* 43 C.F.R. § 2201.1 (e), as in effect in 1987. Accordingly, as to Lowell Camp, notice by publication was insufficient in law. Publication in the Federal Register thus did not start the statute of limitations running on Camp's claims.

In reaching a contrary conclusion, the district court relied on a statement in *Friends of Sierra Railroad, Inc. v. Interstate Commerce Commission*, 881 F.2d 663 (9th Cir. 1989), that "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." 881 F.2d at 667-668. That statement accurately reflects the main statutory rule embodied in section 1507, but it does not reach the express statutory exception for circumstances where publication is "insufficient in law." *See*, 44 U.S.C. § 1507. In *Friends*, and in all of the cases on which it relied, there was no suggestion that the agencies involved had any independent legal duty to give notice by a means other than publication. Accordingly, the statutory exception was not before us in *Friends* court and we did not need to discuss it.

BLM relies on *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362 (9th Cir. 1990), in which we held that a mining company's challenges to certain BLM actions were time-barred because BLM had given notice of the

action in the Federal Register more than six years prior to the suit. Again, however, in *Shiny Rock* there was nothing to suggest that BLM had any independent duty to give the mining company notice other than by publication.

Accordingly, while it undoubtedly is the law that publication in the Federal Register generally serves as notice to all interested parties, it does not serve as notice to persons who are legally entitled to personal notice.

IV.

[2] Although we have differed with the district court as to when the statute of limitations began to run, we nevertheless have concluded that the limitations period expired before this action was filed for reasons explained in our unpublished memorandum disposition filed herewith. As we also reject Camp's other challenges on appeal for reasons discussed in the memorandum, the judgment of the district court is

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORVILLE J. CAMP, JR., Plaintiff-Appellant, v. UNITED STATES BUREAU OF LAND MANAGEMENT; INDIAN HILL LIMITED PARTNERSHIP; THE NATURE CONSERVANCY,	NO. 98-35465 D.C. No. CV-96-3099HO MEMORANDUM[1]

Appeal from United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted May 3, 1999
Portland, Oregon

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1 This disposition is not appropriate for publication and may not be cited by or to the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: CANBY, T.G. NELSON, Circuit Judges, and FOGEL,[2] District Judge.

In a published opinion filed herewith, we have addressed appellant Orville J. Camp Jr.'s contention that the district court erred in finding that the statute of limitations began to run on his claims when a notice of proposed land transfer was published in the Federal Register. In this memorandum, we dispose of Camp's remaining contentions on appeal.

I.

The district court's grant of summary judgment is reviewed de novo. *See San Pedro Hotel Co., Inc. v. City of Los Angeles,* 159 F.3d 470, 477 (9th Cir. 1998). The district court's decision to decline to exercise supplemental jurisdiction over the state law claims is reviewed for abuse of discretion. *See id.* at 478.[3]

II.

A. There Is No Triable Issue of Fact as to When Lowell Camp Received Actual Notice.

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[2] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

[3] In the section of his brief on the standard of review Camp asserts that all the issues raised in this appeal are subject to de novo review. In the section on supplemental jurisdiction, however, it is clear he understands that an abuse of discretion standard applies to that issue.

The Firth affidavit asserts that in the Spring of 1989, Firth gave Lowell Camp actual notice that Indian Hill had acquired the property, and the attachment to the affidavit shows the conversation occurred no later than May 1, 1999. Camp contends there is a factual dispute as to whether Lowell Camp actually had notice. To establish such dispute, Camp cites to his own affidavit which states, in relevant part,

> [N]o actual notice of this conveyance was ever made to myself or my predecessors in interest until March 1995 . . . . Our family's knowledge of Indian Hill's timber activities on this property did not serve to notify us of the change in property title, as this property had previously been logged by Indian Hill while under BLM's ownership.

Camp cannot be faulted for the fact that he cannot submit an affidavit by his uncle directly contradicting Firth, nor can he be faulted for not having been present during the conversation between Firth and his uncle. Nevertheless, Camp's affidavit is insufficient to create a triable issue of fact because it is wholly lacking in foundation to the extent it attempts to establish what Lowell Camp (or any other family member besides Camp himself) knew or did not know. Camp certainly is entitled to declare what his *own*

knowledge was, but without further foundation, his assertions as to Lowell Camp's supposed lack of knowledge are mere speculation.[4]

Camp argues that Firth's conversation with Lowell Camp cannot serve as the actual notice BLM was required to give *before* the conveyance took place. This undoubtedly is true, but it misses the point. BLM is not suggesting the notice given by Firth served as substantial compliance with BLM's pre-conveyance notice obligations. Rather, Firth's conversation gave Lowell Camp actual notice of the conveyance sufficient to start the statute of limitations running on Camp's claim that BLM never gave proper notice and his other claims arising therefrom.

Although Camp does not point to it for purposes of rebutting Firth's affidavit, the one other piece of evidence in the record which arguably is probative of what Lowell Camp knew is the fact that in 1992 he paid the right of way rental fee to BLM. Again, though, it would be speculative to conclude that because he paid the right of way fee to BLM, he must not have known that title to the land was then in the hands of Indian Hill. Lowell Camp just as easily could have

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4 At oral argument counsel insisted that Camp's affidavits show that Camp knew from conversations with his uncle that his uncle could not have known about the transfer in ownership. We have carefully reviewed both of Camp's affidavits and have found nothing on the issue beyond that set forth above, which is inadequate for the reasons we have explained.

believed that fees for the right of way remained payable to the entity which had given him that right of way, for the remainder of its term. Indeed, as late as 1996, BLM itself was taking that position.

Accordingly, there is no triable issue of fact regarding when Lowell Camp received actual notice of the conveyance to Indian Hill. There is no dispute that the applicable statute of limitations is six years. *See* 28 U.S.C. § 2401 (a) (with an exception not relevant here, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (applying § 2401 (a) to an action under the APA).

Firth's conversation with Lowell Camp occurred no later than the date on which it was memorialized, May 1, 1989. The statute of limitations therefore expired no later than May 1, 1995. This action was not filed until December of 1996. The APA and due process claims are time barred.

B. The District Court Correctly Concluded That BLM's Actions Did Not Give Rise to Equitable Tolling.

The district court cited *Federal Election Commission v. Williams*, 104 F.3d 237 (9th Cir. 1996), for the following elements of equitable tolling: 1) fraudulent conduct by the defendant resulting in concealment of the

operative facts, 2) failure of the Plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and 3) due diligence by the Plaintiff until discovery of those facts. *See* 104 F.3d at 240-241. The district court correctly found that there was no evidence of any fraudulent intent on the part of BLM; the undisputed evidence was that BLM collected the right of way rental fee in error.

Camp argues that equitable tolling can occur without actual fraud, citing *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989). Even under *Watkins*, though, "a party seeking to raise estoppel against the government must establish affirmative misconduct going beyond mere negligence." 875 F.2d at 707. Nothing in the record would support a finding that BLM's conduct was more than mere negligence.

More fundamentally, equitable tolling only applies where a Plaintiff has failed to discover the operative facts that are the basis of the claim. *See Williams*, 104 F.3d at 240-241. Here, Lowell Camp was informed of the operative facts by Firth. As Lowell Camp's successor in interest, Camp cannot claim equitable tolling.

C. The District Court Correctly Concluded it Lacked Jurisdiction under the Quiet Title Act Because BLM Disclaimed All Interest in the Property.

The Quiet Title Act contains a twelve year limitations period, so the foregoing analysis does not apply to Camp's claim under the Act. *See* 28 U.S.C. § 2409a (g). The Act also provides, however,

> If the United States disclaims all interest in the real property or interest therein adverse to the Plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. § 2409a (e).[5]

Here, the district court found and confirmed in its order that BLM had disclaimed all interest in the property at issue.[6] Accordingly, the district court lacked jurisdiction

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5 28 U.S.C. § 1346 (f) confers exclusive jurisdiction on the district courts of actions under section 2409a.

6 Camp argues that BLM's "post-hoc" affidavit submitted during the litigation disclaiming any interest in the property should be rejected because it is inconsistent with the contemporaneous record which showed BLM continuing to assert an interest in the right of way after the conveyance. This argument fails because BLM has the statutory right to disclaim any interest and thereby divest the court of jurisdiction at any time prior to the commencement of trial, regardless of what

over Camp's Quiet Title Act claim.

Camp argues that continued jurisdiction was proper under *Donnelly v. United States*, 850 F.2d 1313 (9th Cir. 1988). In *Donnelly*, we held that where a Plaintiff alleges a title dispute arising from administrative wrongdoing under the APA, jurisdiction under the Quiet Title Act is proper, even after the United States has disclaimed any interest. We stated,

> There is good reason to allow the Donnellys to assert the APA as a jurisdictional basis for their title dispute under § 2409a(e). Otherwise, a claim founded on a title dispute stemming from administrative wrongdoing might be unreviewable by the United States' pre-trial disposal of the property, because § 2409a(e) would require dismissal of the claim against the United States. Moreover, in any title dispute or trespass defense against the successor-in-interest to the United States . . . the Donnellys would be barred from asserting their "administrative wrongdoing" theory of title because . . . the United States would be a necessary party over whom no jurisdiction could be exercised.

850 F.2d at 1318.

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interest it previously claimed.

Thus, *Donnelly* stands for the proposition that where there ordinarily would be no jurisdiction under the Quiet Title Act (because the government disclaimed any interest in the property) there may still be jurisdiction via the APA based on violations of a party's rights which occurred prior to disposition of the property. Here, Camp is advocating the *converse* proposition, i.e., that there can be jurisdiction under the Quiet Title Act even though there is no claim under the APA (because the claim is time-barred). The latter proposition, however, does not follow from the former, either as a matter of logic, of statutory construction, or of policy. While Camp suffers the same inability to obtain review of agency action as the *Donnelly* Plaintiffs, it is not only because BLM disclaimed any interest in the property, but also because the statute of limitations expired. Thus, our concern in *Donnelly* that the government should not be able to sell or dispose of the property to evade answering a timely allegation of administrative wrongdoing is not present here. We therefore affirm the district court's conclusion that Camp's claims under the Quiet Title Act are barred.

D. The District Court Did Not Abuse its Discretion in Declining to Exercise Supplemental Jurisdiction over the State Law Claim.

Camp argues that the district court failed to consider the relevant factors when deciding not to exercise supplemental jurisdiction over his state law claim It is true

that the district court's order does not discuss the court's reasoning, but that is not an abuse of discretion. *See San Pedro Hotel*, 159 F.3d at 478 ("We hold that the district court did not abuse its discretion by failing to provide reasons to support its conclusion [that it would not exercise supplemental jurisdiction].") Furthermore, it is clear from the context that the district court's decision not to exercise supplemental jurisdiction was based on 28 U.S.C. § 1367 (c) (3), which gives a court discretion not to exercise supplemental jurisdiction when it "has dismissed all claims over which it has original jurisdiction."

Camp's argument that it nevertheless was unreasonable and an abuse of discretion to dismiss the claim under the Oregon quiet title statute turns on the assertion that only the federal court can adjudicate fully the title issues "as to all of the affected and necessary parties." Were that true, it certainly would weigh heavily in favor of exercising supplemental jurisdiction. The flaw in the argument, however, is that even if the district court had retained jurisdiction over the state claim, BLM would not have been a party to the claim. *See Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (Quiet Title Act is the exclusive means for resolving title disputes involving the federal government.)

IV.

Although we have concluded in our published

opinion that publication in the Federal Register is insufficient to trigger the statute of limitations as to persons who are legally entitled to personal notice, the record establishes that Lowell Camp had actual notice of the conveyance outside the limitations period for Camp's APA and due process claims. Equitable tolling is unavailable. The district court correctly concluded it lacked jurisdiction over the Quiet Title Act claim, given BLM's disclaimer of any interest in the property. The district court did not abuse its discretion in dismissing the remaining state law claim.

Camp's cross-motion for summary judgment therefore was moot, as is his request for attorney's fees under the Equal Access to Justice Act. We AFFIRM the judgment of the district court.

APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORVILLE J. CAMP, JR., Plaintiff-Appellant, v. UNITED STATES BUREAU OF LAND MANAGEMENT; INDIAN HILL LIMITED PARTNERSHIP; THE NATURE CONSERVANCY, Defendants-Appellees	NO. 98-35465 D.C. No. CV-96-3099-HO ORDER

Before: CANBY and T.G. NELSON, Circuit Judges, and FOGEL,[1] District Judge

The panel has voted to deny Appellant's petition for rehearing. Judges Canby and T.G. Nelson voted to deny

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1 The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.